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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

PHILIP A. DETERESI,

v.

CITY OF LOS ANGELES and KENNETH LEW,

On Petition For Writ Of Certiorari
To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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84 pp

I. QUESTIONS PRESENTED FOR REVIEW

1. May an employer (defendant) successfully rebut an admitted prima facie case of an age discrimination lawsuit under the ADEA 29 USC 623 et al without a showing that the test which was used to disqualify the applicant (plaintiff) has content validity or without a showing by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s)?

2. Does an employee, after establishing a prima facie case, have the additional burden of proof that the employer's testing procedures are validly related to the performance of critical and/or important work behavior 29 CFR 1607.14(D)(3)?

3. Does an employee, after establishing a prima facie case, have the additional burden of proof, beyond pretext, to show that the employer was involved in a conspiracy against him or her?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice William H. Rehnquist and the Honorable Associates Justices of the United States Supreme Court. Petitioner Philip A. Deteresi, a dismissed Recruit Officer with the Los Angeles Police Department, respectfully prays that a Writ of Certiorari be issued to review the judgments of the California Supreme Court and The California Court of Appeals for The Second District (Division Two) in the above-entitled proceeding.

II. OPINIONS BELOW

The Second District Court of Appeal (Division Two) of the California Court of Appeals reversed the jury verdicts on October 30, 1996 with an unpublished opinion , which is attached in the appendix as Exhibit A. The Plaintiff filed a petition for rehearing, which was denied on November 22, 1996, and is attached in the appendix as Exhibit B. Plaintiff filed a Petition For Review with the California Supreme Court on December 9, 1996. Plaintiff's Petition for review to The California Supreme Court was denied on January 28, 1997, and is attached in the appendix as Exhibit C.

III. JURISDICTION

Petitioner brought suit against the City of Los Angeles, the Los Angeles Police department and Sergeant Kenneth Lew for violation of the Age Discrimination in Employment Act. The Superior Court's jurisdiction was based on said Age Discrimination in Employment Act, 29 USC sec 621 et seq, . This court's jurisdiction is pursuant to 28 USC sec.1257.

IV. STATUTORY PROVISIONS INVOLVED

Section 4(f)(01) of the Age Discrimination in Employment Act ("ADEA") provides that:

> "... it shall not be unlawful for an employer, employment agency, or labor organization ... to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section ... where the differentiation is based on reasonable factors other than age ..."

This section is interpreted in 29 CFR 1625.7(d)(e) which states as follows:

> "(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and

such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at part 1607 of this title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually."

V. STATEMENT OF THE CASE

A. Factual Background

Mr. Deteresi entered a 28-week recruit training program at the Los Angeles Police Department Academy in 1989, when he was 41 years old. He had an extensive military background and was a Major in the Marine Corps Reserve at the time. Mr. Deteresi was passed in all of the tests in his training program, except one, self defense.

The Plaintiff's trouble occurred with the Self-Defense test which all recruits were required to pass to graduate. The exam consisted of three segments and were graded by three self-

defense instructors. The first two segments each have three subsections. The graders used printed forms and the recruit was required to receive a passing grade from two of the three graders to pass the exam. Mr. Deteresi passed all subsections and the first two exams. The final section was upper body control and front gun take away. Mr. Deteresi passed the upper body control subsection but according to the instructors did not pass the front gun take away portion. The Los Angeles Police Department terminated Mr. Deteresi's's employment asserting that Mr. Deteresi's failure to pass this one segment of the self-defense test rendered him incapable of graduating from the Academy. Officer George Caulford, an LAPD Officer at the time of the trial, testified that he had testified at the administrative hearing to the following: He ran into Lew and asked about Deteresi. Lew responded that Deteresi was "no good" and "not doing very well at the academy" and that he "is [too] old to be in [the] academy. In weapons training, Mr. Deteresi had an average score of 80, which, he testified, was considered "excellent." In a simulated street scene with "bad guys" and victims, Mr. Deteresi correctly hit 14 out of 18 targets. He received a marksman medal for his shooting abilities. He ranked seventh in a class of 79 in peer evaluation. During his first series of tests, in first aid, drivers training, CPR,

report writing and academic testing, he received better than passing scores. During the 17th week of training, Mr. Deteresi took another CPR test. The passing grade was 75; he scored 74. He took the test again and passed with a score of 92; To put it in another way, Mr. Deteresi was passing in every class he had at the Los Angeles Police Academy until he came under the control of the self-defense instructors. In the self-defense tests, the front gun take away portion of the test was less than two minutes in duration and the grading on front gun take away was purely subjective.

A classmate of Deteresi at the academy, Officer James Kuklok, testified that he struck up a conversation with Lew after Deteresi was discharged and Kuklok graduated, and Lew told him that Deteresi was too "fucking old" to be in the academy in the first place.

Deteresi's expert, Arnold Schmeling, testified that a self-defense test "is totally and completely subjective." He also stated, "Self-defense is one of those areas where there is absolutely no way to measure." He opined that it would fairer to use a classification employing scores of pass, fail or needs improvement.

The City conceded and the Court of Appeal accepted that Deteresi made a prima facie case of age discrimination, which

shifts the burden to the City to articulate legitimate, non-discriminatory reasons for the termination. (Chaffin v. Textron, 861 F. Supp. at pp. 975-976.)

B. Procedural Background

Mr. Deteresi filed this lawsuit against the City of Los Angeles and Officer (Now Sergeant) Kenneth Lew, alleging age discrimination in violation of The Age discrimination in employment act 29 USC 623, 629, 631. At trial Mr. Deteresi asserted that the Physical Training Department's failure to pass him in the self-defense test was a pretext for age discrimination and that the tests used to fail him from the academy were totally subjective, and bore no relationship to his ability to do the job as a police officer on the streets. The jury returned a 9 to 3 verdict against the City and a 12 to 0 verdict against Sergeant Lew. The City moved for a new trial or Judgment Not Withstanding the Verdict of the Jury. During oral argument the City's attorney brought up the issue of conspiracy The motion was denied and the City and Lew appealed. The Second District Court of Appeal (Division Two) of the California Court of Appeals reversed the jury verdicts on October 30, 1996, which is attached in the appendix as Exhibit A. The court of appeal stated that the tests were important to determine Deteresi's

ability to perform as a police officer and that he had not shown that the officers at the academy had conspired against him. The Plaintiff filed a Petition for Rehearing on November 12, 1995 arguing that the city's tests were not validated, were not in conformity with Federal Regulations and had not been shown to bear a rational relationship to the skills actually necessary to work as a police officer and that it was the City's burden to prove the validity of their tests. The Plaintiff also argued that he had meet his burden of pretext and that the Court of Appeals had misinterpreted the rules set forth in Federal Case Law as to the weighing of evidence and the shifting burden of proof. The Plaintiffs petition for rehearing was denied on November 22, 1996, which is attached in the appendix as Exhibit B. Mr. Deteresi filed a Petition For Review with the California Supreme Court on December 9, 1996, in which he argued that the city's tests were not validated, were not in conformity with Federal Regulations and had not been shown to bear a rational relationship to the skills actually necessary to work as a police officer and that it was the City's burden to prove the validity of their tests, and that the guidelines set forth by congress to apply to tests used for any employment decision had not been followed. The Plaintiff also argued that he had satisfied his pretext element with substantial evidence. Plaintiff's Petition to

the California Supreme Court was denied on January 28, 1997, which is attached in the appendix as Exhibit C.

VI. REASONS FOR GRANTING THIS WRIT

A. In ADEA Cases, an Employer Alleging Non-Discriminatory Reasons for Terminating an Employee for Failure to Successfully Pass a Subjective Test Should Strictly Comply with the Uniform Guidelines on Employee Selection Procedures as Stated In 29 CFR 1625.7 and 29 CFR 1607 et Seq.

It was conceded that Plaintiff had established a prima facie case of age discrimination under the Age Discrimination in Employment Act (Appendix, Exhibit A, page 30, Paragraph 1.). The City was required to introduce evidence establishing that the discharge was based upon a legitimate, nondiscriminatory reason. Thus, any reason which is credible and nondiscriminatory is permissible. These requirements were set forth by this court in McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802 ; 36 L.Ed.2d 668; 93 S. Ct. 1817 and later reaffirmed and clarified in Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248; 67 L.Ed.2d 207; 101 S. Ct. 1089.

The City's sole evidence was based on how Deteresi performed on the physical training test which the City administered. The City did not even attempt to persuade the Trial Court or the Court of Appeal that these tests were in conformity with federal law. Section 4(f)(01) of the Age Discrimination in Employment Act ("ADEA") provides that:

> "... it shall not be unlawful for an employer, employment agency, or labor organization ... to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section ... where the differentiation is based on reasonable factors other than age ..."

This section is interpreted in 29 CFR 1625.7(d)(e) which states as follows:

> "(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with

the standards set forth at part 1607 of this title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the **employer bears the burden of showing that the "reasonable factor other than age" exists factually.**" (emphasis added)

The City therefore has the burden of showing that its selection procedures were in conformity with the rules and regulations in 29 CFR 1607. Fairly construed, the City did not even attempt to show that they were in compliance with the Uniform Guidelines in Employee Selection Procedures. Their sole evidence was based on how Deteresi performed on the test which they devised and implemented, and a test that they themselves admitted was subjective (Appendix, Exhibit A page 15 bottom of paragraph, Testimony of Lew; page 38, 2nd. paragraph, testimony of Conta). Deteresi had an exemplary record in the academy (Appendix Exhibit A page 7, last paragraph) in areas that had objective grading standards and measurable test results and standards, including areas that required a high degree of hand eye coordination, like shooting. The Court of Appeal says that achieving high grades in all of the above areas is no indication that a recruit will be a good police officer (Appendix Exhibit A, page 33, paragraph a, page

34.) but adopts the city's position that the opposite holds true, that poor performance in a physical self-defense test is an indicator that a recruit will be a poor police officer on the job. Yet there has been no showing by the city that the ability to perform a carotid choke hold or take a gun away from someone is an integral and daily function of a Los Angeles Police Officer. No rational explanation was given why this one segment of a physical self-defense test is so important that it alone can end a recruits career, especially when he has passed all other tests, other than to say ---- this was their policy.

The City did not cite any validity studies under 29 CFR 1607.5 or cooperative studies as cited under 29 CFR 1607.8. These guidelines have been in effect since 1978 and

> "... apply to tests and other selection procedures which are used as a basis for any employment decision. ..." (29 CFR 1607.2(b)).

The City did not attempt to establish technical standards for validity studies, if they've done any, as required by 29 CFR 1607.14.

The standards for adequate and fair testing are set forth in detail in 29 CFR 1607.14. For example, 29 CFR 1607.14(c)(2) states as follows:

> "(2) *Job analysis for content validity.* There

> should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If the work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behaviors that can be observed and the observed work products. **The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job**."
> (emphasis added)

The City did not event attempt to show how this one portion of one test of very many is a critical work behavior and/or an important work behavior constituting most of the job yet the Court of Appeal indicated that it considered the testing and training important to work in the field (Appendix Exhibit A bottom of page 33, Paragraph (a) to top third of page 34). Deteresi passed every single test given to him with the exception of the front gun take-away (Appendix Exhibit A page 7, 3rd

paragraph to page 8, top half). In order to give the front gun take-away any credence, it was the burden of the City to demonstrate its content validity. 29 CFR 1607.14(c)(4) which provides in pertinent part:

> "...To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job....
>
> ...In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. ....that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). ....As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is

> to be content valid, and the greater the need for other evidence of validity."

The selection process should show the work behavior for successful performance of the job. 29 CFR 1607.14(D)(3) states in pertinent part:

> "... The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly relation to the performance of critical or important work behavior(s). ..."

In its opinion, the Court of Appeal acknowledges that "...the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision ..." (Appendix Exhibit A page 30, first paragraph).

The Court of Appeal goes on to state, "The City established through the testimony of many academy instructors that Deteresi did not perform the self-defense maneuvers that were required for graduation in the three separate tests ... (Appendix Exhibit A page 30, paragraph 2.). " Much testimony supported that academy's conclusion that Deteresi did not perform even minimally well on the deadly-force exam. ..." (Appendix Exhibit A, page 31, 4th. line from top).

The problem with those conclusions is that the City did

not address the issue. The issue is that where the tests are used as a basis for an employment decision, that decision has to be based on knowledge, skill and abilities which are related to the performance of the job and work behaviors which constitute the most important parts of the job. Sergeant Lew testified that the exam was actually an LAPD use of force exam to determine whether or not the right techniques were used (Appendix Exhibit A, page 15, middle of page). Officer Duplessis, one of Deteresi's graders, stated that certain elements of the techniques were performed correctly by Deteresi but "We go on the totality of the technique" (Appendix Exhibit A page 36, top third) Sergeant Conta, a defense witness, testified that a recruit may not pass the gun take away even though he in fact takes the gun away from the suspect, "Because it depends on the technique" (Appendix Exhibit A, page 36, middle of page.) if the technique is more important than successfully obtaining the suspects weapon the LAPD should have empirical data to support this position. It is highly suspect that one technique, and only one technique is taught throughout the entire country to all police recruits.

29 CFR 1607.14(C)(8) states as follows:

"(8) *Operational use*. A selection procedure which is supported on the basis of content validity

may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for the performance of the job) or work behaviors which constitute most of the important parts of the job."

Moreover, 29 CFR 1607.14(D)(3) states:

"(3) Relationship to the job. A selection procedure should then be identified or developed witch measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above." (emphasis added)

B. A Plaintiff Can Show Pretext in Two Ways, Either Directly by Persuading the Court That a Discriminatory Reason More Likely Motivated the Employer or Indirectly by Showing That the Employer's Proffered Explanations Is Unworthy of Credence.

The nexus between the evidence Deteresi presented and the City is the subjective nature of the test Deteresi allegedly flunked. Deteresi passed all portions of the academy requirements prior to this self-defense "deselector" portion of the academy (Appendix Exhibit A, page 7, first paragraph to page 8). Deteresi passed most of the self-defense parts . Simply stated, when you add all of his tests together, Deteresi passed two thirds of the self-defense test and at least one third of the third segment of the self-defense test (Appendix Exhibit A, page 9 - 11, Page first Paragraph, middle of page). Mr. Deteresi's expert, Arnold Schmeling, testified that a self-defense test is totally subjective and impossible to measure (Appendix Exhibit A, page 16, first full paragraph), and subjective tests are looked upon with suspicion by Federal Appellate Courts as set forth in Jaurequi v. City of Glendale (9th Cir 1988) 852 F2d 1128, page 1136.. The test to terminate Deteresi in this case had absolutely no credence.

The subjective nature of this deselector test alone has a disparate impact and also provided a convenient pretext for discriminatory practices and disparate treatment, particularly in lower echelon employment (like a police recruit). There is no secret that this subjectivity provides an easy out for use of the legitimate business rational. That is why present Federal case law says that such test are to be viewed with much skepticism, Atonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 810 F.2d 1477, 1481; yet the California Court of Appeals apparently disagrees, accepting the LAPD subjective self-defense test as accurately measuring how a police officer will perform in the field (Appendix Exhibit A, page 30, Paragraph a).

This Court has ruled an employer may not condition an employment opportunity on the satisfaction of facially neutral tests or qualifications that could have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job, Watson v. Fort Worth Bank & Trust (1988) 487 U.S. 977, 108 S. Ct. 2777.

What holds true for the protected group should also hold true for the protected individuals when they are out side of the group, as it is their status as protected individuals that defines the group.

An analogy can be made between the instant case and Fadhl v. City and County of San Francisco (9th Cir. 1986) 804 F.2d 1097,. Although that was a gender discrimination case, it dealt with a police trainee who was treated differently than the other trainees. Ms. Fadhl was subjected to more stringent standards, as a police trainee, because she was a female. The Fadhl court indicated that the City must show that male candidates performance record was as good or better than Fadhl's performance. The City did not show that younger recruits in the same academic position as Deteresi were also failed on the third test and dismissed from the academy. The City's only evidence is that Deteresi did not complain that he was left handed nor did not comment/complain that Sergeant Lew was being unfair to him (Appendix Exhibit A, page 18, top one third). Let's not be so naive as to believe that a police recruit can object to the teaching principle(s) without risking a termination "for cause" or the wrath of his instructors (Appendix Exhibit A, page 11, full paragraph to the middle of page 12).

The City admitted that Deteresi had two graders who sat on all three of his tests (Appendix Exhibit A, page 15, first paragraph; page 25 First sentence of last paragraph) Deteresi satisfied his pretext element with substantial evidence that Lew's discriminatory bias motivated the employer and the proffered

weak rebuttal explanation of the City that they did not have enough graders to go around (Appendix Exhibit A, page 15, middle of page). There was also testimony that it was LAPD policy to rotate graders (Appendix Exhibit A, page 15, second sentence of first paragraph; page 27 paragraph D). and the city's explanation for their failure to follow their own policy is what the Deteresi jury rejected as unworthy of credence.

C. Must the Plaintiff Also Prove Conspiracy

At various places in its written opinion, the court of appeal made reference to the concept of a conspiracy (Appendix Exhibit A, page 3, 1st. Paragraph; page 14 top of page; page 31, bottom third of page). The Court of Appeal recognized that the City in its brief had in fact admitted that Deteresi had made a prima facia case of age discrimination (Appendix Exhibit A, page 30, paragraph 1.). Advancing to the second prong of the test and speaking about the city's claimed legitimate, non-discriminatory reasons for the termination, the court, stated "Nor did Deteresi produce any evidence showing that Lew influenced other graders, that the City's explanation for using the same graders on all three tests was false, or that there was in fact a conspiracy among the instructors to get Deteresi out of the

academy" (Appendix Exhibit A, page 31, bottom third).

This court in McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802 ; 36 L.Ed.2d 668; 93 S. Ct. 1817 and later reaffirmed and clarified in Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248; 67 L.Ed.2d 207; 101 S. Ct. 1089 set forth the method of proof that is to be used in such cases. In Price Waterhouse v. Watkins (1989) 109 S. Ct. 1775 this court refined that method of showing pretext even further by saying that discriminatory comments directed at the plaintiff is a showing of pretext. In the instant case the California Court of Appeal stated that Sergeants Lew's statements to officers Caulford and Kuklok that Deteresi was "Too old to be in the academy " and "He was too fucking old to be in the academy in the first place"(Appendix Exhibit A, Page 14, last paragraph to top of page 15) "were not described as being representative of the City or the academy. (Appendix Exhibit A, page 42, paragraph g.). The California Court of Appeals also stated that the city had successfully rebutted the plaintiffs prima facia case through the testimony of many academy instructors, and that "We reach this conclusion even after considering the comments made by Lew" (Appendix Exhibit A, page 30, Paragraph 2 through page 31) even after admitting that under federal case law that "Such comments can be direct evidence of age

discrimination" (Appendix Exhibit A page 30, 3rd paragraph). Although the trial court found Officer Cortland-Stark and Sergeant Lew, two of Deteresi's graders, to be uncredible witnesses the fact that the trial judge did not specifically comment on each of the instructors apparently made the others credible (Appendix Exhibit A, page 31, middle of the page). In Price Waterhouse (supra) this court stated that when an employer considers both the legitimate and illegitimate factors at the time of making the decision, the decision was because of the illegitimate factor, even if the decision would have been the same absent that factor. Price Waterhouse v. Hopkins (1989) 109 S. Ct. 1775, 1785-1786. The California Appellate Court went on to say that Mr. Deteresi had not produced any evidence that Sergeant Lew had influenced other graders (Cortland-Stark, whom the trial court found lacking in credibility, or Duplessis) or that the city's explanation for using the same graders on all of his tests was false or that he had shown that there was a conspiracy among the instructors (Appendix Exhibit A page 31 lower third of page). The California Appellate Courts opinion would apparently establish a different an additional burden of proof of a conspiracy, to a showing of pretext.

VII. CONCLUSION

This case presents the sharply focused issue of what proof is necessary for an employer to articulate as a legitimate nondiscriminatory reason for its employment decision and what burden of proof must a Plaintiff meet when addressing the issue of pretext.

Deteresi successfully passed each and every test required by the respondent. He successfully passed seven out of eight sections (87.5%) of the self-defense test.

The City asserts that is can disqualify and terminate Deteresi on an infinitesimal minute portion of the totality of the training program which is: (1) totally subjective; (2) is conducted and chaired by a person who made ageist remarks about petitioner, and (3) has not been shown to have any rational nexus to the important functions of the job.

Under the ADEA, 29 USC sections 623 et seq., specific guidelines have been promulgated by Congress to apply to tests which are used for any employment decision [29 CFR 1607 et seq.].

The Court of Appeal did not require nor made any mention of these Uniform Guidelines as enacted by Congress. By requiring employers to comply with the Uniform Guidelines

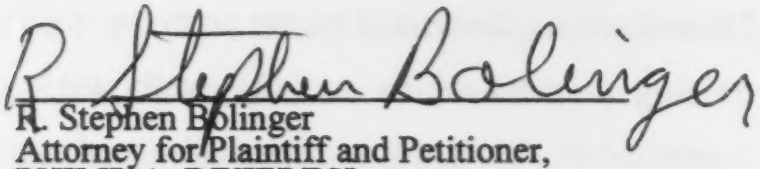
on Employment Selection Procedures, the law would be more predicable to protect the rights of all parties concerned.

This Court has set forth the burdens of proof for each party in an ADEA case and the California Court of Appeal has changed them.

The Petition for Writ of Certiorari should accordingly be granted.

Dated: April 23, 1997

Respectfully submitted,



R. Stephen Bolinger
Attorney for Plaintiff and Petitioner,
PHILIP A. DETERESI

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PHILIP A DETERESI Plaintiff and Appellant v. CITY OF LOS ANGELES and KENNETH LEW Defendants and Appellants	B091310 Supr. Ct. No. BC052988 Court of Appeal Second District FILED Oct 30, 1996 Joseph A. Lane Clerk Deputy Clerk

Appeal from a judgment of the Superior Court of Los Angeles County. Reginald A. Dunn, Judge. Reversed.

R. Stephen Bolinger and Andrew O. Feringa, for Plaintiff and Appellant.

Seyfarth, Shaw, Fairweather & Geraldson and Patricia A. Kinaga, for defendants and Appellants.

1. INTRODUCTION

A jury awarded Philip Deteresi (Deteresi) $814,000 in damages in an age discrimination action [1] brought against Los Angeles Police Department Sergeant Kenneth Lew (Lew) and the City of Los Angeles (together the City) [2]2 pursuant to the Age Discrimination in Employment Act (ADEA).

In a special verdict, the jury found that Deteresi's age was a factor in his dismissal from the Los Angeles Police Academy (the academy), and that the defendants failed to establish a legitimate reason for terminating his employment. The jury awarded Deteresi

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1 The complaint also alleged wrongful termination and negligent supervision, but those counts were dismissed.

2 Nonsuit was granted in favor of a third defendant, Carlo Cudio.

$95,000 back pay; *$395,000* "front pay;" $124,000 pension benefits; and $200,000 liquidated damages.

The City filed a motion for judgment notwithstanding the verdict (JNOV), new trial and/or remittitur. The motion was denied. The court stated that in its view there was sufficient basis for the jury to infer a conspiracy to discriminate against Deteresi, relying in large part on testimony repeating comments about Deteresi's age made by Lew. The court found that two of the City's witnesses, Lew and Officer Judith Cortland Stark, were not credible. The court found further that the City did not establish incontrovertibly that Deteresi should have been discharged because he failed the self-defense exam.

The court also denied Deteresi's request for attorney fees. Both sides appeal.

We hold that Deteresi's evidence was insufficient as a matter of law, and that the JNOV motion should have been granted. Therefore, the judgment is reversed.

II. CONTENTIONS

A. The City's Appeal

The City contends that (1) there was insufficient evidence to support the finding of liability and seeks to have the denial of the motion for JNOV reviewed on that ground, (2) remittitur should have issued because the damage award was excessive and based on groundless assumptions, and (3) new trial should have been granted because the evidence did not support the verdict.

B. Deteresi's Appeal

Deteresi contends that (1) statutory authority provides for attorney fees to the prevailing party; (2) the trial court did not follow appropriate federal case law in determining the attorney fees issue; and (3) the amount he requested, $108,336, was reasonable.

III. DISCUSSION

A. Standard of Review

Our review of the evidence and our recitation of the facts is greatly affected by the standard of review. Where the sufficiency of the evidence is challenged, we ordinarily view the evidence in the light most favorable to the judgment, in which case we need not recite the evidence of both sides. As noted below, cases brought under ADEA involve a shifting burden of proof. To better evaluate the evidence under that standard, a synopsis of the evidence presented by both parties pertinent to the issue of liability will be presented.

Nevertheless, because the issue raised by a JNOV is whether there was sufficient evidence to raise a question of fact for the jury, we still read the record in the light most advantageous to Deteresi, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the judgment. *(Chappell* v. *GTE Products Corp.* (6th Cir. 1986) 803 F.2d 261, *265; Kuhn* v. *Department of General Services* (1994)22 Cal.App.4th 1627, 1632-1633.) Although the fundamental principle is that there must be a minimum of interference with the jury, if the court finds that the evidence points so strongly in favor of the moving party that reasonable minds could not come to a different conclusion, then the JNOV should be granted. (See *Chappell* v. *GTE Products Corp., supra,* at *p.265; Kuhn* v. *Department of General Services, supra,* at p.1633.)

B. Deteresi's Evidence

Deteresi entered a 28-week recruit training program at the academy in 1989, when he was 41 years old. He had an extensive military background and was a lieutenant colonel in the Marine Corps Reserve at the time.

During his first week of physical training, he was standing in formation and was approached by Lew, who asked whether it was true that brain cells die at age 40. Deteresi testified that Lew was always close by. Once, during baton movement training, Deteresi was unable to hear Lew because, Deteresi testified, Lew mumbled. Lew advised Deteresi to take steroids to improve his hearing. Deteresi was unable to remember Lew making any additional comments, though, Deteresi stated, "[T]he looks were there."

In weapons training, Deteresi had an average score of 80, which, he testified, was considered "excellent." In a simulated street scene with "bad guys" and victims, Deteresi correctly hit 14 out of 18

targets. He received a marksman medal for his shooting abilities. He ranked seventh in a class of 79 in peer evaluation. During his first series of tests, in first aid, drivers training, CPR, report writing and academic testing, he received better than passing scores. During the 17th week of training, Deteresi took another CPR test. The passing grade was 75; he scored 74. He took the test again and passed with a score of 92.

The recruits were instructed on how to apply kicks, use the police baton and apply upper body control holds, in addition to gun retention, and how to take a gun from a suspect in a life-threatening situation, known as gun take away. Then, during week 17, the recruits took the first self-defense test, which they were required to pass to graduate. The exam had three segments and was graded by three self-defense instructors. Each recruit was paired with another recruit who acted as a suspect. The graders used preprinted forms, and the recruit

was required to receive a passing grade from two of the three graders in order to pass the exam.

For Deteresi's first self-defense test, Lew was the "chairman," who called out the maneuvers to be executed. Deteresi failed portions of section three, entitled, "Deadly Force," which tests on the ability to execute specific maneuvers in life threatening situations, i.e., when faced with combative suspects, armed suspects and those trying to take away the officer's weapon. The section had three segments: upper body holds (front shoulder smash/modified application of pressure on the suspect's carotid veins, rendering the suspect unconscious); taking the suspect's gun; and keeping the officer's gun

from the suspect.[3] The maximum points on Deadly Force was 30, and the minimum 18. [4]

Deteresi passed the section on weapon retention but did not pass the sections on upper body control holds and gun take aways. Part of the training for the upper body control holds involved baton use. Deteresi is left-handed, but he was not initially instructed on left-

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3. As stated in the City's Appellant's Opening Brief, "In this part of the exam, the recruits were required to smash the suspect's front shoulder, turn the suspect around, quickly get behind the suspect while placing the officer's's forearm... around the suspect's neck on both sides of the suspect's carotid~id arteries at a 45-degree angle so the suspect's spine is perfectly straight, sit the unconscious suspect down, place the suspect face down on the ground, pivot, place a knee behind the suspect's neck and shoulder at a 90-degree angle (which places the most amount of weight on the suspect) and, using the officer's body weight on the suspect, apply a twist or wrist lock on the suspect to maintain control of the suspect (suspects often wake up very quickly, and having the lock insures more control in the event the suspect wakes up before being cuffed) and then cuff the suspect."(Fn. omitted.)

4. Most of the explanation of the exam elements were taken from testimony given by the City's witnesses.

handed baton use. Up until the 17th week, Deteresi executed the baton maneuvers with his right hand. Asked if the instructors knew that he was left-handed, he replied, "I assume so." There were two primary baton instructors, and several officers who would help them. Lew was one of the other officers during Deteresi's baton instruction.

Just after the self-defense test, the recruits are assigned to divisions outside the academy.[5] Deteresi was assigned to the Northeast division. Because he had not passed the self-defense exam, however, he was not permitted to work in the field. During his assignment, his supervisor at the division, Lieutenant Waterman, phoned the academy and asked Sergeant Mark Conta why Deteresi could not work in the field. When he was informed that Deteresi did not pass the self-defense exam, Waterman wondered how someone with Deteresi's military background did not pass the test. Conta stated

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5. Most of the facts related to Deteresi's assignment were taken from testimony given by the City's witness, Mark Conta. They are included here to improve the flow of the narrative.

that he just had not passed and would have to go through remediation like anyone else. Conta reported the conversation to the officer in charge of the physical training and self-defense unit, Sergeant Nichols. When Deteresi returned to the academy, Nichols, in Conta's presence, said that by talking to Waterman, Deteresi had jumped the chain of command and aired the academy's dirty laundry. After that, Deteresi noticed that about 40 percent of the instructors adopted an abrasive attitude toward him.

Deteresi received 10 hours of additional training for each section he failed. During week 19 or 20 he retested. On the front gun take away portion, he failed the control section, receiving a grade of 2, where a grade of 3, was required Two graders from the first exam, one of whom was Lew, graded Deteresi's second test.

Deteresi received an additional 15 hours of remediation, retested and again failed Deadly Force. Lew and another instructor, Officer Cortland Stark, gave him the exact same scores in all three

segments of the test. Deteresi declined the opportunity to resign from the academy. Rather, he challenged the training division's decision to discharge him from the academy A hearing was conducted by the department's Equal Opportunity Development Division.

Deteresi testified, and presented witnesses and evidence at the bearing. The hearing officer was Captain Cudio, who had signed the notice of discharge recommendation. Deteresi did not object to Cudio being the hearing officer. In his written findings, Cudio stated that there was not enough evidence to establish that Lew was prejudiced against Deteresi. Deteresi's employment by the department terminated based on his failure to pass the self-defense exam.

Deteresi testified at trial that, in his opinion, he passed the self-defense tests. He also stated that he thought that Cudio bad a conflict of interest, since he was the person who approved his firing and he was also the hearing officer. Deteresi admitted that he had no reason to believe graders Cortland Stark and Esquivel were

influenced by Lew, had no idea how the other graders felt about his age, did not believe that instructors White and Jarvis were part of a conspiracy and that they were fair, and he had no idea of the role anyone other than Lew played in the conspiracy against him.

George Caulford, a friend of Deteresi's from the Marine Corps and an LAPD officer at the time of the trial, testified that he had testified at the administrative hearing to the following: He *ran* into Lew and asked about Deteresi. Lew responded that Deteresi was "no good" and "not doing very well at the academy" and that he "is [too) old to be in [the) academy." Caulford also testified at trial that there had been recruits over the age of 40 who had graduated from the academy.

A classmate of Deteresi at the academy, Officer James Kuklok, testified that he struck up a conversation with Lew after Deteresi was discharged and Kuklok graduated, and that Lew told

him that Deteresi was too "fucking old" to be in the academy in the first place.

Lew was called by the plaintiffas a hostile witness. (Evid. Code, § 776.) Lew stated that normally the academy tries to change the graders for repeat tests taken by recruits, but in Deteresi's case Lew and another instructor were on all three tests. Lew suggested to his supervisor that there be different graders for the third exam. He was told that he would have to sit as a grader because at that time there was a lot of turnover at the academy and there were not enough experienced people to grade. He also explained that the third segment of the self-defense test is really an LAPD use of force examination to determine "[w]hether or not that person uses the correct force in a certain situation. Whether they use the right techniques in that situation." Asked whether the grading of the recruits' performance is subjective or objective, Lew replied that each grader subjectively grades, and that there are no precise standards. He pointed out,

though, that there are three graders who do not discuss the numbers and points before giving the score. Lew denied making the statement to Kuklok about Deteresi's age, stating, "I don't even cuss . .

Deteresi's expert, Arnold Schmelling, testified that a self-defense test "is totally and completely subjective." He also stated, "Self-defense is one of those areas where there is absolutely no way to measure." He opined that it would be fairer to use a classification employing scores of pass, fail or needs improvement.

Deteresi called Carl Cudio pursuant to Evidence Code section 776. Counsel for Deteresi asked Cudio about several things related to the fact that he was the hearing officer at the administrative hearing: that he had sworn testimony that one of the instructors might have been prejudiced against a recruit because of age, that the recruit was terminated for failing a test, that the instructor in question was a grader on all three tests, which was not the policy of the academy. Asked why Cudio did not think that there was a reason to recommend

that the discharge not go forward, he testified that even if Lew were taken out of the equation Deteresi would have failed, that Deteresi had an opportunity to examine Lew on the issue but did not, and the other graders were not called to testify to determine whether Lew had inordinately influenced their decisions.

C. The City's Evidence

Officer Nunez, one of the graders for Deteresi's second test, recalled that during training Deteresi 's performance was uneven: "sometimes a very good recruit, performing the way we were teaching him, and other times... he wasn't the same."

Sergeant Conta, who was responsible for supervising all the physical training and self-defense techniques taught to the recruits, was informed by the other instructors to take a look at Deteresi because he needed work and his performance level was not very good. Conta found that Deteresi's skill level was substandard, and

worked with Deteresi to improve. Like Deteresi, Conta is left-handed. He stated that the fact that Deteresi is left-handed was not an issue in his training because left-handed recruits are taught left-hand techniques. He never heard Deteresi complain that he was being forced to learn right-hand techniques.

Lew had no role in determining who sat on the rating panels, though Conta did. Deteresi never complained to Conta that Lew was being unfair to him. Nor did Conta observe anything that led him to believe that anything was unfair to Deteresi during the administration of any of the three tests. Like Nunez, Conta noticed that Deteresi had good and bad days.

Lew gave rather detailed testimony of Deteresi's mistakes in the first two tests, among them: Deteresi used his weak hand, the right one, to control the suspect and his stronger, left hand to remove the key ring when getting the handcuffs; Deteresi did a poor search of the suspect's chest area and legs, and he lacked control of the suspect

or the situation during the search; in the twist wrist lock, Lew noted no hands on head and poor balance; in attempting to pick up the suspect from a sitting or prone position, Deteresi failed to point the suspect's elbow, dip and scoop; Deteresi was out of balance and had his groin exposed because his feet were not perpendicular to the suspect's feet; three of four kicks by Deteresi lacked power; in using the baton, he used the wrong hand position; in the deadly force portion of the test, Deteresi pushed the suspect rather than smashed his shoulder, which would have forced the suspect to pivot so that his back is to the officer's chest, and speed and balance were lacking during that maneuver; Deteresi let the pressure drop on the suspect's carotid artery, which could result in letting the suspect's blood flow back so the person can continue to fight with the officer rather than maintaining the hold so the blood is blocked until the person is unconscious; he also failed to put pressure on the twist lock when he was going to handcuff the suspect; he telegraphed that he was going

to take the suspect's gun from him; he did not follow the technique of putting the knee to the groin when taking the gun away; he did not use the cartwheel, a way of manipulating the suspect's weapon to take it away; on gun retention, Deteresi took out his weapon with the wrong hand; and he did not hit his target on side.

Robert Jarvis, a master instructor of physical training in self-defense at the academy, was involved in remediation for all 17 of the recruits in Deteresi's class who failed the self-defense exam the first time. His analysis of Deteresi's performance during the second test was that he was a little hesitant in the upper body control holds, a little weak on the "smash" aspect of that hold. His movement was off balance, the sitting down and control over the suspect was not as had been practiced; and in rolling over and preparing to handcuff, Deteresi's knee was not in the proper position, and his left hand was not in the middle of the back for stability when he pivoted.

Officer Nunez was one of the graders for Deteresi's second test. He did not know Deteresi's age when rating him. Nunez's handwritten notations from the grading sheet stated, primarily, that Deteresi lacked power when he displayed his kick techniques, and that he did not extend his leg when kicking. During the baton portion of the test, Deteresi was nervous and "he showed a lot of shaking," he was unsure whether he was doing what he was supposed to be doing. Nunez noted that the shoulder smash, the attempt to turn the suspect around, was weak. His arm was not in the position to slip into the carotid hold, but was straight out to go under the trachea, which is against LAPD policy. In the roll over and cuff, Deteresi lacked balance because he failed to place his hand down to balance himself when he put his knee on the suspect's back. He then jumped around to go behind the suspect, which he was not supposed to do, as that will also cause a loss of balance. Deteresi telegraphed his movements to the suspect. He did not properly control the suspect's weapon or his

own during the gun retention section. He did not knee the suspect in the groin with strength. He failed to pivot, which caused a loss of strength. During gun retention, Deteresi's finger was not along the frame, as required by LAPD policy. He lacked confidence and speed in general.

As with the other two tests, to pass the third and final self-defense exam, Deteresi needed two of the three graders to each give him a score of 18. Lew and Cortland Stark gave him a score of 17. The third grader, Charles Duplessis, gave him 16.

Jarvis was involved in the second remediation, and he was present at the third test. According to Jarvis, Deteresi did not perform as he was taught during remediation. He was still deficient in the upper body holds, not smashing, not sitting the suspect properly, not controlling the suspect during roll over. The gun take away was slow and he did not use a knee to smash during the gun take away. He did not back off far enough for a covered position after taking the

suspect's gun. Weapon retention was also weak with respect to stepping, pivoting, and smashing the suspect's elbow on the two-hand technique where the suspect tries to grab the officer's weapon, and his cartwheel was improper. Jarvis did not see anything to indicate that Lew was influencing the other graders. In his opinion, Deteresi did not pass the self-defense test, and he should not have graduated from the academy.

Lew read his notations from his grading sheet for the third test, which included comments on the following: (1) Deteresi's front shoulder smash was weak. The maneuver is used to sit the suspect in an upright position. The way Deteresi did it caused the suspect's body to be in a position which put more pressure on the person's neck, which could cause it to break. He was also slow in executing the move; (2) when doing the locked carotid, Deteresi used the wrong hand to push, and when he rolled over and handcuffed the suspect, he was slow and he did not have his body weight on the suspect to keep

him on the ground while putting on the handcuff; (3) with respect to the gun take away, Lew testified that the recruits are told that you have to make the person not think about the weapon they have, to distract them. Deteresi did not engage in any distraction technique during this maneuver. He failed to leave enough space between himself and the suspect for the gun take away. The officer is supposed to put the suspect's weapon in the rear behind the officer's rear hip. Then, the officer takes out his or her weapon and retreats, creating some space between the officer and the suspect; (4) Deteresi dropped his baton during the test; (5) on gun retention, Deteresi's balance was weak. He was not pivoting, getting power because his gun was too far out, or getting away from the suspect. Overall, Deteresi did not generate enough power to take the weapon or maintain the weapon.

Conta testified that Deteresi did not perform well on the day of the third test. Asked if he should have been scored as having passed the exam, he responded, "Not at all. He failed."

Charles Duplessis, who was a grader for Deteresi's third exam, made the comments on his rating sheets similar to the ones made by the others: that his smashing of the suspect lacked force; that he was unable to balance himself while he had the suspect down on the ground; that his leg was too close to the suspect when Deteresi had him on the ground; that he was unsure of his techniques, which were slow and uncertain; that he failed to distract the suspect during front gun take *away;* failed to leave enough space between himself and the suspect when he drew his weapon; he had his weapon pointing at the floor rather than at the suspect; he was off balance during weapon take away and pivoted poorly. Duplessis characterized Deteresi's movements as "robotic."

Cortland Stark was a grader on all three of Deteresi's exams. She testified that during the third test his smash was weak and slow, and that his stance was slightly off balance, leaving him in a position of not have complete control over the suspect. During the front gun

take away, Deteresi was too close to the suspect and failed to distract him. He hesitated when removing the suspect's gun.

Cortland Stark recalled that, in general, she had a very difficult time teaching Deteresi techniques because he was very slow in learning them. She stated that "he just couldn't grasp them."

Commander Bushey, a personal friend of Deteresi who encouraged him to apply to become an LAPD officer and who was his mentor during the application process and his time in the academy, stated that Deteresi never told him that he was being discriminated against by Lew or that he was having any difficulties at the academy.

D. Deteresi's Rebuttal Evidence

The administrative hearing testimony of Jerry Mulford, a tactics instructor at the academy when Deteresi was a recruit, was read into the record. He stated that if a recruit had to repeat a test, a grader for the first test should not be a grader for subsequent tests. He also stated that in the past more than three attempts to pass the self-defense test were given to "quite a few people." He was unable to name any of those recruits.

E. Analysis

The ADEA, 29 U.S.C., section 623, subdivision (a)(l), makes it unlawful to "discharge any individual . . because of such individual's age." This prohibition applies to individuals who are at least 40 but less than 70 years old.(U.S.C. § 631, subd. (a).)

The shifting burden of proof applied to Title VII discrimination claims also applies to claims arising under the ADEA.

(Rose v. *Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1420.) As stated in *Chaffin* v. *Textron,* N..D. Cal. 1994) 861 F.Supp 972, 975, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. Then, the plaintiff must demonstrate that the employee's alleged reason for the decision is a pretext for discrimination.

A litigant can establish a violation of ADEA using either of two related theories: disparate treatment, that he or she suffered intentional discrimination in employment because of age; or disparate impact, that a facially neutral employment practice in fact treated more harshly employees in the protected age group. *(Cotton* v. City *ofAlameda* (9th Cir. 1987) 812 F.2d 1245, 1247.) This case was tried as a disparate treatment case.

The following rules are found in *Cotton* v. City *ofAlameda, supra,* at p.1248. To prevail on a disparate treatment theory, a plaintiff must prove intentional discrimination. A plaintiff makes out a prima facie case of intentional discrimination under the ADEA by demonstrating that he or she was in the protected class of persons between 40 and 70 years old, that he or she applied for a position for which they were qualified, and that a younger person with similar qualifications received the position. Establishing a prima facie case raises an inference of discrimination which the employer can rebut by demonstrating that it had a legitimate,nondiscriminatory reason for its decision. The plaintiff then must come forward with evidence that the employer's reason is mere pretext to conceal its discriminatory motive.

1. Deteresi's prima facie case

The City concedes that Deteresi made a prima facie case of age discrimination, which shifts the burden to the City to articulate legitimate, non-discriminatory reasons for the termination. *(Chaffin* v. *Textron, supra,* 861 F.Supp. at *pp.975-976.)*

2. The City's legitimate, non-discriminatory reasons

Deteresi's prima facie case under the ADEA was more than sufficiently rebutted. The City established through the testimony of many academy instructors that Deteresi did not perform the self-defense maneuvers that were required for graduation in the three separate tests. We reach this conclusion even after considering the comments made by Lew.

Lew's remarks were given great weight by the trial court, and such comments can be direct evidence of age discrimination. *(0'Connor v. Consolidated Coin Caterers Corp.* (4th Cir. 1995) *56*

F.3d *542, 545,* reversed on another ground in *O'Connor* v. *Consolidated Coin Caterers Corp.* (1996) ___ U.S. - [116 S.Ct. 1307, 1308).) The discharge of Deteresi was not a matter within the sole discretion of Lew, however. Much testimony supported the academy's conclusion that Deteresi did not perform even minimally well on the deadly-force exam. Even if the trial court did not find Lew and Cortland Stark credible, the court made no comment on the credibility of the City's other witnesses, all of whom found Deteresi's performance deficient. Nor did Deteresi produce any evidence showing that Lew influenced other graders, that the City's explanation for using the same two graders on all three tests was false, or that there was in fact a conspiracy among the instructors to get Deteresi out of the academy. Thus, we find no evidentiary basis for concluding, as the trial court impliedly did, that Deteresi's case was not rebutted.

3. Deteresi's showing of pretext

A plaintiff can show pretext in two ways: either by directly persuading the court that a discriminatory reason more likely motivated the employer or by indirectly showing that the employer's proffered explanation is unworthy of credence. *(Cotton* v. *City of Alameda, supra,* 812 F.2d at p.1248.) Deteresi attempts to persuade us on both points. Either way, however, Deteresi was required to introduce evidence that casts doubt on the City's contention that there was a legitimate business reason for terminating him. *(Billet* v. *Cigna Corp.* (3rd Cir. 1991) 940 F.2d 812, 825.) Deteresi did not provide enough evidence to create a jury question regarding the City's serious articulated concerns with his performance and his qualifications for the job.

Other than his own testimony, Deteresi did not offer any evidence that he was capable of performing the skills on which he was tested. His belief in his own capability is not relevant, however.

(*Smith* V. *Flax* (4th Cir. 1980) 618 F.2d 1062, 1067 Plaintiff's "perception of himself, however is not relevant. It is the perception of the decision maker which is relevant. The decision to terminate... was reached only after a process of much consultation and inquiry focusing upon his capability of performing... ,"]; *Lovelace* v. *Sherwin-Williams Co.* (4th Cir. 1982) 681 F.2d 230, *245* [self-serving opinion not corroborated by more objective ones has no significant probative force].) Thus, the City's legitimate, non-discriminatory explanation for the discharge was not rebutted.

Deteresi argues that his performance was undermined by the LAPD's discriminatory intent. He offers the following as evidence establishing that intent:

a. First, that he had passed all of his training requirements until segment three of the self-defense exam. However, the fact that a person is a good marksman, or good in first aid and academics, or that a person scores high in peer evaluation does not conclusively

establish that the person will be a good police officer. A recruit must also show that he or she can handle resisting and possibly armed suspects in the field. If it were enough to pass the exams that Deteresi points to, the academy would not have to train or test people in self-defense. The need for appropriate response in a simulated confrontation situation is fairly obvious, as is the possibility that one may perform some aspects of a job well but be unable to perform other requirements satisfactorily.

In this argument, Deteresi contends that the training officers agreed that he should have passed the self-defense portion of the exam. Supporting this is a citation to Jarvis 's testimony, where he was asked whether Deteresi should have passed the third test. Jarvis answers that Deteresi should have passed, but he did not perform adequately. A short while later he testified, unequivocally, that Deteresi did not pass the test. Considered in context, it is clear that

Jarvis meant that, given all the training he had received before the test, Deteresi should have passed but that he did not.

Second, Deteresi asserts that the City's witnesses testified that he did pass selected parts of segment three of the self-defense exam. He again takes statements made by the witnesses out of context. For example, Jarvis testified that Deteresi passed gun retention, as did Sergeant Roland Esquivel, who graded Deteresi on the first exam but not on the third exam. It is not contested that Deteresi passed the gun retention portion of the third exam, however. Deteresi failed upper body control holds and gun take aways, and none of the City's witnesses stated otherwise.

In response to Deteresi's additional arguments on this second point, we note that Lew testified that, at a minimum, a recruit was required to get a score of three in each area of technique and control, for a total of six points for each move, with a total grade of 18 points. Lew gave Deteresi two threes and a four on each of the three control

parts. When asked if Deteresi "passed on control," Lew responded, "It's a total picture, point total." In addition, Duplessis testified that certain elements of the techniques being tested were performed correctly by Deteresi, but "we go on the totality of the technique." Nunez, who graded Deteresi on the second but not the third exam, testified that he gave Deteresi sevens in control and technique on the use of side hand baton. Moreover, Conta testified that a recruit may not pass the gun take away portion of the exam even if he or she ends up with the suspect's gun, because it "[d]epends on the technique." Because, Conta explained, "You could be shot [in the] process."

Deteresi's arguments in this section do not establish that the instructors and graders were motivated by age discrimination.

b. Deteresi contends that the City's violation of its own policy by not changing all graders for the second and third tests indicates a discriminatory pattern. However, the City rebutted an inference of discrimination with its explanation of why the same

graders were used. He also claims that the fact that he was not given a fourth attempt to pass indicates a change in policy. According to Conta, in 1991 one recruit was given a fourth chance. That does not establish a prior policy of affording everyone a fourth chance to take the test. Deteresi also cites to his rebuttal evidence, the testimony of Mulford, who stated that in the past quite a few people were given more than three chances, but he could not give the name of even one. Mulford's testimony was not sufficient to establish discrimination.[6]

c. Deteresi asserts that there was evidence of his hand-eye coordination, which supported his passing performance. He contends that even Conta and Cortland Stark testified that usually an individual's hand-eye skills carry over to other areas of performance. Since both of them also testified that in Deteresi's case that did not

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6 We note too that Deteresi's witness, Caulford, testified that there had been recruits who were more than 40 years old who had graduated from the academy.

occur, the portion of their testimony Deteresi seeks to rely on for that point does not establish the City's discriminatory intent.

d. Deteresi points to inconsistencies in the testimony of the City's witnesses on the grading standards for the self-defense exam. He points out first that his expert, Schmelling, testified that the LAPD's subjective grading system is unreasonable. Schmelling also testified that there is no way to measure self-defense. He did not explain how his recommended system of pass, fail or needs improvement would be any less subjective than the system used at the academy.

Deteresi notes the testimony of Conta, who testified that the grading was subjective with objective criteria, and Duplessis who stated that he used a totality of -points when grading the self-defense exam. He then compares that evidence with the testimony of Jarvis, who testified that a three-point minimum score on each sheet is passing; Esquivel, who, he argues, testified that "there is a no point

scoring system;" and Cortl and Stark, who employed a numerical minimum passing system. We note that there is no contradiction among Contra, Duplessis, and Cortland Stark. The only contradiction is between Jarvis and Esquivel, but it exists only because Deteresi has misstated Esquivel's testimony. He was asked whether anyone ever told him how many points a minus was worth. His reply, "There was no one point system." He then explained, "[I]t depended on the... criticality of the mistake." In other words, he was not saying that there was a system that did not use points, but that there was not a single system by which to determine the value of a mistake. It depended on the seriousness of the error.

e. Deteresi cites the credibility of the City's witnesses. He gives only one example, though: Commander Bushy, who had trouble remembering facts and figures. However, the memory of one witness did not undermine the City's case, nor did it contribute to

Deteresi's burden of establishing intentional discrimination against him.

f. Deteresi states, "Commander Cudio of the LAPD [JA 346:1-2] admits that he was aware of the discrimination by one of the LAPD instructors that administered the self-defense exam but all three times *[sic]* [JA 359A:4-6; 359~8-360A3]. But felt that without corroborating evidence on point, he could not stop the termination of Mr. Deteresi." The trial transcript reveals a very different scenario. The testimony cited by Deteresi refers to the administrative hearing regarding Deteresi's dismissal. That portion of the transcript picks up after a change of reporters, and it begins in the middle of things, with a reference to Caulford's administrative hearing testimony that one of the instructors may have been prejudiced against a recruit because of his age. Asked if he believed Caulford, Cudio stated, "I believed him to be telling the truth the way he saw it." Counsel for Deteresi then stated:

"Q. So you have sworn testimony that one of your instructors may have a prejudice against [a] recruit because of his age.

"A Correct.

"Q And this recruit is being terminated based upon the failure to supposedly pass a test; correct?

"A Correct.

"Q On which that instructor sat on all three boards, which was not the policy of the Academy; correct?

"A Yes.

"Q And you didn't think that that was a reason to recommend to the chief that it not go forward?

"A No.

"Q Why not?

"A First of all, if we took Lew out of the... equation totally, Deteresi would have failed.

"The Witness: Secondly, Mr. Deteresi had an opportunity to examine Officer Lew on that issue, and didn't do it. Thirdly, by inference, there was a suggestion that Lew somehow, because of his seniority, or some other influence he might have *with* his peers, that he inordinately influenced the other graders But they never called the other graders to give testimony on that issue. And so without any support for it, I was not able to form a basis to... recommend that... the termination not proceed. And because they didn't raise it, it left me with the inference that they didn't want to call those witnesses because they knew that it would be damaging." Based on the record, Deteresi's reading of the transcript is rejected.

g. Deteresi points to the testimony of Kuklok and Caulford, both of whom reported that Lew stated Deteresi was too old to be in the academy. Such remarks by Lew were not described as being representative of the view of the City or the academy. Lew was by no means the only person who was involved in the grading of

Deteresi or who critiqued his performance and found that he was not up to par in the area of self-defense. Thus, the testimony of Kuklock and Caulford does not make it more likely that Deteresi's discharge was motivated by discrimination against him. Nor does it have the effect of rendering the City's explanation for the discharge unbelievable.

Nothing in Deteresi's argument on appeal compels us to change our conclusion that he failed to establish intentional discrimination. We therefore hold that there was insufficient evidence of intentional discrimination as a matter of law, and the judgment must be reversed.

In light of the foregoing conclusion, we need not address the additional contentions raised by the City. Nor do we consider Deteresi's appeal from the denial of his request for attorney fees as the prevailing party.

IV. CONCLUSION

The judgment is reversed. The City is awarded costs on appeal.

NOT TO BE PUBLISHED.

NOTT, J.

We concur:

BOREN, P.J.

FUKUTO, J

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 11/22/96

R. Stephen Bolinger
421 No Brookhurst Street
Suite 124
Anaheim CA. 92801

RE: Deteresi, Philip
vs.
Los Angeles, City of
2 Civil B091310

THE COURT:

Petition for rehearing denied.

Second Appellate District, Division Two, No. B091310

S057751

IN THE SUPREME COURT OF CALIFORNIA

PHILIP A. DETERESI, Appellant

v.

CITY OF LOS ANGELES and KENNETH LEW, Appellants

Petition for review DENIED

SUPREME COURT
FILED

Jan 28, 1997

Bob Wandruff Clerk

DEPUTY

GEORGE

Chief Justice

29 U.S.C. 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse or refer for employment, otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in

any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupation qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans, discharge of discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization --

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69, and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers'; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American Employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the --

(A) interrelation of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial , of the employer and the corporation.

29 U.S.C. 626 Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited action under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed --

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action upon receipt of notice

Section 259 of this title shall apply to actions under this chapter.

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waive is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit

incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to --

(i) any class, unit, or group of individuals covered by such program, and time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.